

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Cable)	
Television Consumer Protection)	
and Competition Act of 1992)	
)	CS Docket No. 01-290
Development of Competition and Diversity)	
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act:)	
)	
Sunset of Exclusive Contract Prohibition)	

COMMENTS OF GEMINI NETWORKS, INC.

Gemini Networks, Inc. (“Gemini”), submits its Comments in the above-captioned Notice of Proposed Rulemaking.

I. Summary

The Commission should determine that the prohibition on exclusive contracts between vertically integrated programming vendors and cable operators in areas served by the vertically cable operator must be extended.¹ The advent of bundled cable television, telephony and data (particularly Internet access) services is finally making facilities-based broadband competition for home users a reality. More than a dozen companies throughout the Nation are beginning to build hybrid fiber coaxial (“HFC”) and other broadband networks to provide competition to the incumbent cable television franchisees and incumbent ILECs in the residential communications market. These new companies are just beginning to build out their networks. Allowing the prohibitions contained in §628(c)(2)(D) to sunset on October 5, 2002, would hurt the likelihood of many of these networks bringing competition to the residential broadband market. This

Nation needs a continuation and expansion of the prohibitions in Section 628(c)(2)(D) to assure the build out of broadband networks, not only for purposes of providing the benefits of competition to residential consumers, but also to provide redundancy for national security purposes.

The Commission should take these three specific steps to stop abuses inherent in exclusive programming contracts for vertically integrated programming vendors and cable operators:

1. Extend sunset provisions of Section 628(c) to continue current restrictions on satellite-based exclusivity.
2. Initiate a review of possible expansion of the exclusivity restrictions to include terrestrial distribution and eliminate the current terrestrial signal exemption loophole; and
3. Initiate a study to evaluate the need to have Congress amend Section 628 to clarify that, in addition to satellite cable operators, the statutory protections also extend to alternate terrestrial service providers such as broadband service providers (“BSPs”) against vertically integrated incumbents. The inclusion of BSPs is consistent with the purpose of Section 628(a), which is to promote competition in the multi-channel video programming market.

II. Background on Gemini

Gemini Networks, Inc. designs, constructs and operates hybrid fiber coaxial broadband networks in the Northeast. Gemini has constructed its initial network in Connecticut and believes that it was the first, or one of the first facilities-based broadband networks to provide true open access to Internet service providers (“ISPs”) on a continuing basis. Gemini has secured appropriate authorizations from Public Utility Commissions in seven states in which it plans to build its networks.

¹ 47 U.S.C. §628(c)(5).

Despite the advanced technical design of its networks, Gemini has run into problems caused by incumbents as it moves ahead to deploy its networks and secure additional financing to complete that deployment. Access to poles, conduits and rights-of-way, access to multiple dwelling units and access to programming from incumbent ILECs and incumbent cable operators are serious problems.

III. Extension of Sunset Date Prohibiting Exclusive Contracts

New broadband service providers such as Gemini, must compete directly against entrenched, incumbent cable television companies. These companies have enjoyed a virtual monopoly on providing multiple channel video services for more than a generation. In fact, the Commission recognizes over 80% of all multi-channel video services are provided by incumbent cable television multiple system operators (“MSOs”)². Only recently have satellite-to-home services become available, and penetration of this service is limited to date.

Furthermore, ownership of the MSOs has been consolidating for a number of years, with less than a dozen MSOs controlling the vast majority of all cable television systems and subscribers. New BSPs, such as Gemini, face stiff resistance from MSOs in the geographic areas in which the new BSPs seek to offer service. It is not unusual for cable operators to work aggressively to enter into exclusive contracts with multiple dwelling unit owners in a particular geographic area shortly before a new BSP completes build out its network and begins to roll-out service. Another practice by incumbent MSOs is to threaten litigation if a franchising authority fails to require a new BSP to enter into an identical or more stringent franchise agreement, even though the incumbent cable operator has held a decades-long head start.

This MSO conduct is designed to maintain their existing facilities-based broadband monopoly. If the exclusivity prohibition is eliminated, there is little question

² Seventh Annual Report, paras. 5 and 15.

but that new BSPs would be denied access to programming services controlled by vertically integrated MSOs.

It is difficult enough for a new BSP to raise the substantial amounts of money necessary to build broadband networks. Denial of programming content could stop deployment of these new networks throughout the Nation.

The financial markets have been very difficult for more than a year. Sources of financing will simply not open up again if new BSPs are denied access to video programming, as will certainly happen if the sunset date is not extended.

An essential purpose of Section 628 is to stimulate development of new technologies. New BSPs are building broadband networks that are state-of-the-art and provide network redundancy, an important consideration in the post-September 11th world. These networks are extremely expensive. Many new broadband service providers must bundle multi-channel video, voice and Internet access to make these networks financially viable. Denial of access to video programming by vertically integrated MSOs will destroy the viability of multi-channel video offerings and the economic viability of these new networks. Residential subscribers demand certain minimum programming offerings and are unlikely to subscribe to services of new BSP networks unless such offerings are provided.

IV. Terrestrially Delivered Video Programming

There are instances in which MSOs have converted satellite-delivered programming to terrestrially-delivered programming. Gemini submits that a primary reason for doing so may well be to escape the exclusivity prohibitions of Section 628³. As the cable industry further consolidates, this is becoming a more serious problem. Gemini urges the Commission to review this issue carefully and consider the public interest benefits of extending programming exclusivity prohibitions to terrestrially-

³ However, the Commission has not made such a finding to date in any of its decisions.

delivered programming fare where there is vertical integration between the MSO serving the geographic area and control of the programming itself.

One particularly noteworthy issue is regional sports programming. The success of new broadband networks may hinge in substantial part on the availability of regional sports programming. Gemini believes that such programming is an essential programming service. This programming is being distributed terrestrially in a number of key markets and it an important element in a multi-channel video programming package. Prohibiting cable operators from misusing their control over this type of programming will promote the competitive viability of new facilities-based broadband networks in various areas around the Nation, including in the more expensive to build top ten markets and their adjacent suburbs. If the Commission determines that Section 628(b) provides it with jurisdiction to prohibit exclusive contracts by vertically integrated MSOs, then Gemini submits that it would be appropriate for the Commission to initiate a Notice of Proposed Rulemaking on the subject. If the Commission determines that it does not have jurisdiction, legislative relief may be necessary and appropriate and Gemini urges the Commission to support that effort. That support could include a finding that exclusivity prohibitions are in the public interest and would promote construction of alternative facilities-based broadband networks to compliment the incumbent cable networks that now serve much of the Nation.

V. Conclusion

Gemini submits that it is in the public interest for the Commission to extend the sunset date of the prohibition on exclusive programming contracts with vertically integrated MSOs. The Commission should also address abuses that exist and that are likely to occur in the future by means of a rulemaking proceeding to address programming exclusivity of terrestrially-delivered programming. However, if the Commission determines that it lacks statutory authority, the Commission should support imposition of such limitations by means of appropriate Congressional legislation.

Respectfully submitted,

GEMINI NETWORKS, INC.

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